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In the Supreme Court of the United States

EMPRESS CASINO JOLIET CORP., DES PLAINES LIMITED PARTNERSHIP, HOLLYWOOD CASINO-AURORA, INC., AND ELGIN RIVERBOAT RESORT,

Petitioners,

v.

ALEXI GIANNOULIAS, ILLINOIS RACING BOARD, BALMORAL RACING CLUB, INC., HAWTHORNE RACE COURSE, INC., MAYWOOD PARK TROTTING ASS'N, NATIONAL JOCKEY CLUB, AND ILLINOIS HARNESS HORSEMEN'S ASS'N.,

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Illinois

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The question presented in this case – whether, and in what circumstances, the government's expropriation of money may constitute a taking – is one of enormous importance. In *Eastern Enterprises*, a fractured Court was unable to provide a definitive answer to that question. Since that decision was issued, the law on the issue in the lower courts has been "chaotically unsettled." George F. Will, *Racing Past the Constitution*, THE WASHINGTON POST, Apr. 12, 2009, at A17. Scholars likewise have been unable to "offer[] a coherent theory of the relationship between taxes and takings." Kades, 97 NW. U.L. REV. at 190. Pointing to this uncertainty, and to the tremendous practical significance of the question, commentators have described the decision below as a profoundly troubling one that warrants this Court's review. *Riverboat Robbery*, THE WALL STREET JOURNAL, March 24, 2009, at A16; Will, *supra*, at A17.

Although respondents attempt to minimize the scope of the Illinois Supreme Court's decision, they appear to accept the central premises of the petition. They seem to recognize that a taking *would* occur were "'big box' stores forced to subsidize more politically potent 'local retailers.'" Opp. 22. They acknowledge that the federal courts of appeals are in conflict on "what precedential weight to afford" *Eastern Enterprises*. *Ibid.* They have nothing to say about the dubious provenance of the Act (see Pet. 6-7 n.3), or the gerrymandering that targeted the Act's burden at a subset of less politically powerful casinos. See American Legislative Exchange Council ("ALEC") Br. 14-15. And in light of the extraordinary outpouring of amicus support for the petition,

respondents cannot seriously dispute the significance of the question presented.

In nevertheless opposing review, respondents offer two arguments. They insist that the issue raised in the petition "simply is not presented in this case" because the Illinois Supreme Court did not "hold that money can never be the subject of a takings claim." Opp. 10. And departing from the holding below, they maintain that petitioners' takings claim must ultimately fail because "gambling and related licensees are not entitled even to claim a property interest in the undiminished values of their licenses." *Ibid.* Neither of these arguments offers a valid basis for denying review of the straightforward and important question presented in the petition.

A. The Court Should Resolve The Question Whether The Exaction Of Money May Effect A Taking

1. As for respondents' first argument against review, there can be no doubt about the nature of the holding below – or that the question presented by the petition is indeed "in this case." The Illinois Supreme Court declared expressly and repeatedly that "the takings clauses of the federal and state constitutions apply only to the state's exercise of eminent domain and not to the state's power of taxation." Pet. App. 21a. See *id.* at 23a ("The 3% surcharge is in no way tied to real property."), 24a (in *Eastern Enterprises* "a majority of the Justices rejected the theory that an obligation to pay money constitutes a taking"), 25a ("five Justices of the Supreme Court in *Apfel* reaffirmed the traditional rule that regulatory actions requiring the payment of money are not takings"), 26a ("The case at bar does not involve the state's exercise of its eminent domain powers, but

rather involves the exercise of its taxing powers."). Whether the court below was correct in this holding, which expressly rejected the contrary conclusion of the *Eastern Enterprises* plurality (see *id.* at 24a-25a), is a matter that warrants this Court's attention.

2. In arguing against review, respondents suggest that the Illinois Supreme Court recognized two narrow exceptions to its otherwise categorical rule that expropriations of money are not takings; these are said to apply when the exaction is (1) "'tied to real property'" or (2) derived from "specific property interests in money," which respondents take to mean some sort of defined fund. Opp. 13, 15. For several reasons, respondents' attempt to minimize the import of the state court's decision is wrong.

First, respondents' description of possible limits on the scope of the holding below is entirely beside the point because the Illinois Supreme Court found *neither* exception to apply in this case. Instead, its clear and unequivocal holding was that the exaction of money can *never* be a taking in circumstances like those here, where a small group of identified entities is required to pay a specified amount of money to particular competitors.

Second, respondents' observation that the court below might entertain a takings claim regarding unspecified "identifiable property interest[s]" (Opp. 22) does nothing to diminish the conflict in the lower courts identified in the petition. It is plain that the Fifth Circuit in *United States Fidelity* (discussed at Pet. 13) – which followed the analysis of the *Eastern Enterprises* plurality – rejected the rule adopted by the Illinois Supreme Court when it held that a taking was effected by a state law that "extract[ed] money from businesses." 226 F.3d at 417. Respon-

dents' argument to the contrary (Opp. 17) rests on a misreading of *United States Fidelity*. There, the insurer property owners' liability was *measured by* amounts previously paid into a workers' compensation fund, just as the assessment here is measured by daily casino revenues. See 226 F.3d at 414-415, 420 ("The assessments against these plaintiffs arise from the specific fund of benefits they pay to claimants in Louisiana each year."). But there was no requirement in *United States Fidelity* that the assessment be paid *from* any particular source, and the State did not purport to take any particular fund or account owned by the insurers. See *id.* at 414-415.[1]

Respondents get no further in their attempt to distinguish *Smith* and *Kirk* on this ground. Opp. 17. In those cases, state supreme courts held that takings had been effected by laws requiring payment to the State of a portion of punitive damages awards. See Pet. 11-13. In its practical operation, the Act challenged in this case is identical, requiring the payment of a portion of each day's casino revenues – although the transfer here is *more* troubling because the funds go directly from the property owner to private competitors, rather than to the State for public use. In each case, the property owner had a vested, legal entitlement to particular funds and was forced by the State to surrender a portion of those funds. It is not at all apparent why the funds at issue in *Smith* and *Kirk* were any more an "identified prop-

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[1] Respondents rely on the Fifth Circuit's statement that the assessments were "'charged by the insurers against [a] fund of reserves.'" Opp. 17. But as described by the Fifth Circuit, there was no statutory requirement to draw the assessment from a reserve fund; the insurers were free to satisfy their liability from any source. See 226 F.3d at 416 & n.7, 420.

erty interest in money" (Opp. 22) than are the already earned daily revenues of specified casinos.

Third, to the extent that respondents are correct that, when money is at stake, the takings inquiry turns on whether the challenged state action "operate[s] upon * * * an identified property interest" or is "measured by a property interest," as suggested by Justice Kennedy's concurrence in *Eastern Enterprises* (524 U.S. at 540), that provides a compelling reason to *grant* review. This Court's guidance plainly is needed to identify the characteristics that qualify an "identified property interest" in money for Takings Clause protection.

As we showed in the petition (at 18, 26-27), the funds at issue here have many of the qualities of a separate account: The sum taken is a portion of the net wagering activity on a particular day at individual casinos, which must be paid over by 3:00 p.m. the day following receipt. See Pet. App. 60a. In response, respondents assert that the Act merely requires payment of "*an amount equal* to 3% of adjusted gross receipts" and is indifferent to the origin of the funds used to satisfy this obligation. Opp. 24. But when payment is required less than twenty-four hours after funds are received, the practical reality is that *those* funds will be the source of the payment.

In any event, respondents are here tripped up by their own observation that money is fungible. Just as the Takings Clause would serve no purpose "if the government could take a person's land by eminent domain, compensate the owner, and then reclaim the money without constitutional limitation" (Fee, 76 S. CAL. L. REV. at 1038), it surely cannot matter for takings purposes that the property owner hands over to the government a particular dollar earned on April 1

rather than an identical dollar that the owner substituted for the first one on April 2.

Fourth, we showed in the petition (at 15-17) that the federal courts of appeals are divided on the meaning of *Eastern Enterprises*. Respondents acknowledge this disagreement but label it "quibbli[ing]" because the courts agree that five Justices rejected a takings theory in that case. Opp. 19-20. That the lower courts all use the same arithmetic, however, does nothing to settle their disagreement about whether the concurring and dissenting opinions in *Eastern Enterprises* may be aggregated to yield a binding rule that has precedential effect. See Pet. 16-17. Nor are respondents correct in asserting that "no court has held * * * that after *Apfel* government action creating a general obligation to pay money violates the Takings Clause." Opp. 21. As we have shown, the Fifth Circuit in *United States Fidelity* followed the analysis of the *Eastern Enterprises* plurality, while the court below expressly rejected it (Pet. App. 25a). This Court should settle this disagreement about the meaning of one of its recent and very important decisions.

Fifth, respondents make no attempt to defend the merits of the decision below, to explain away its logical inconsistencies, or to reconcile its holding with the purpose and history of the Takings Clause. Although respondents do not deny that a taking would occur were the casinos required to hand over their slot machines or cash registers to the tracks, they nowhere explain why a takings challenge is wholly precluded when the State takes cash worth just the same amount. They also cannot square the holding below with decisions of this Court or writings of the Framers indicating that "money *is* property."

Wash. Legal Found., 271 F.3d at 866 (Kozinski, J., dissenting). See Pet. 24 & n.13. And they do not deny that the Act entirely lacks "the kind of general applicability that mutes the concerns behind takings jurisprudence." *Unity Real Estate*, 178 F.3d at 676.

Of course, a requirement to pay money generally will not effect a taking in the constitutional sense; taxes typically are not takings because they "spread the cost of operating the governmental apparatus throughout the society." Sax, 74 YALE L.J. at 75-76. But given the close "factual inquir[y]" required by takings analysis (*Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979); see *Eastern Enterprises*, 524 U.S. at 541 (Kennedy, J.)), a confiscation of money may not be categorically insulated from takings review simply because it is labeled a tax by a state court. Here, the Act has characteristics that decisively set it aside from the usual run of taxes: It takes funds from a small group of identified payers; hands over those funds to a small group of identified private recipients; and requires that the transfers be made on a daily basis. Given the manner in which the "law has struggled with the relationship between taxes and takings" (Fee, *supra*, 76 S. CAL. L. REV. at 1038), the difficult and complex question whether the charge imposed by the Act may effect a taking can be answered only by this Court.

B. Petitioners' Status As Regulated Businesses Is Immaterial To The Question Presented

Respondents' second contention – that a taking could not have occurred because the casinos are state-licensed and heavily regulated, and therefore do not have a cognizable interest in the undiminished value of their licenses (Opp. 23, 25-34) – is a

distraction. Although respondents argued this theory below, it was not adopted by the Illinois Supreme Court and formed no part of that court's analysis. The court instead held, flatly and expressly, that the Takings Clause does not apply to confiscations of money that take the form of a tax. Pet. App. 21a-26a. On the face of it, this holding applies in precisely the same way to money taken from a casino, a newspaper, a factory, or an operator of lemonade stands. That is all that need be said to dispose of respondents' argument that "government action that diminishes the *value* of [petitioners'] licenses and permits * * * cannot be the subject of a takings claim." Opp. 27.

It may be added, though, that the court below did not address this point for a good reason: A claim for the reduction in the value of petitioners' licenses has never been a part of this case. Petitioners do not maintain that they may receive compensation for the diminished value, or revocation, of a state-issued license, which is the subject of most of the authority cited at Opp. 27-33. Their contention, instead, is that specific moneys, lawfully earned and possessed, may not be taken by the State and transferred directly to someone else. See Pet. App. 20a. As to that contention, the authorities cited by respondents say nothing.

If respondents mean to argue more generally that a takings challenge may not be brought by a business that is licensed and heavily regulated by the State, presumably on the theory that the State has made the business's revenues possible or that the business has voluntarily subjected itself to any payment demanded (see Opp. 29-33), they surely are wrong. A great many businesses and professions in

Illinois require licenses – *e.g.*, medicine (225 ILCS 60/3), insurance (215 ILCS 5/121), barber shops (225 ILCS 410) – and the State could outlaw virtually *any* business, so long as it is able to articulate a rational basis for doing so. But even so, the State surely may not, with impunity, take property from such entities and individuals, including money that has been lawfully earned. Respondents seem to agree with this proposition, at least in part; they do not deny that Illinois would effect a taking if it required petitioners to give the tracks particular items of non-monetary personal or intangible property. See Pet. 24. Respondents offer no reason to doubt that the same rule applies when the compelled transfer is of money rather than some other form of property.

C. The Question Presented Is One Of Tremendous Importance

Finally, review is warranted because the question presented is one of great importance, involving a matter on which the Court's guidance is urgently needed. Although respondents try to minimize the significance of the holding below, they do not challenge the essential nature of the Illinois Supreme Court's decision: that government is not subject to Takings Clause scrutiny *at all* when it transfers funds from identified businesses to specific competitors. If this rule remains in place, "[i]n a time of fiscal pressure, Illinois-type actions may be increasingly tempting for state and local governments to get money to prop up politically favored businesses," an outcome that "will only encourage corruption." *Riverboat Robbery*, THE WALL STREET JOURNAL, *supra*, at A16. For this reason, and in light of the pervasive "confusion" on the point in the lower courts, ALEC – representing 2000 state legislators – has

urged the Court to grant review of the "egregious take-and-transfer" in this case so as to "afford[] legislators across the nation much-needed guidance on the constitutionality of such arrangements." ALEC Br. 16.

This case provides an excellent vehicle for doing so. The petition presents the straightforward question whether the taking of money is wholly outside the scope of the Takings Clause, and does so in a context that allows the Court to define the circumstances where money constitutes a "specific property interest" for takings purposes. *Eastern Enterprises*, 524 U.S. at 543 (Kennedy, J.). And the considerations that may make the seizure of money a taking are presented here in the starkest and most disturbing form: Funds were taken from a small group of identified businesses that were selected because they were politically disfavored and unprotected,[2] and were transferred directly (without even passing through the state treasury) to identified competitors, as the result of a process that was tainted by corruption. Putting the best face on it, the State forced "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong*, 364 U.S. at 49); more likely, the State has effected the naked taking of A's property "for the sole purpose of transferring it to another private party B." *Kelo*, 545 U.S. at 477.[3] In either

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[2] Respondents' contention that petitioners were singled out by the Act because "it is a progressive tax" (Opp. 23) cannot be taken seriously. There is little doubt that the Act draws the line it does because downstate casinos were politically protected. See ALEC Br. 14-15.

[3] Respondents point to the Illinois Supreme Court's statements that the Act's purpose is a "'public one'" and that the funds

case, this Court's intervention is necessary to ensure that such a troubling abuse of state authority is subject to challenge under the Takings Clause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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taken are "'earmarked for specific purposes.'" Opp. 24 (quoting Pet. App. 29a-30a). But the first of these statements, which addressed a state-law challenge to the Act, cannot settle the federal constitutional question whether the Act takes property for a "public use." And there is no disagreement about the manner in which the tracks may spend the 40% of the money over which they have complete discretion: Because they may use it for activities they are already undertaking – "'to improve, maintain, market, and otherwise operate [their] racing facilities'" (Pet. App. 29a) – the funds go straight to the tracks' bottom line.